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TRA DOCKET ROOM
March 31, 2005

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VIA HAND DELIVERY

Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re *Petition to Establish Generic Docket to Consider Amendments to
Interconnection Agreements Resulting from Changes of Law*
Docket No 04-00381

Dear Chairman Miller

Enclosed are fifteen copies of a recent Hearing Transcript from the Public Service Commission of the State of Delaware. As shown on page 13 of the transcript, all five Delaware Commissioners agreed to deny and dismiss the CLECs' Motion for Emergency Relief. The CLEC Motion requested that Verizon continue to provide certain de-listed unbundled network elements.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
VOLUME 1

IN RE: IN THE MATTER OF :
THE COMPLAINT OF A.R.C. :
NETWORKS, INC., D/B/A :
INFOHIGHWAY COMMUNICATIONS, : PSC DOCKET NO. 334-05
AND XO COMMUNICATIONS, INC., :
AGAINST VERIZON DELAWARE INC., :
FOR EMERGENCY DECLARATORY :
RELIEF RELATED TO THE CONTINUED :
PROVISION OF CERTAIN UNBUNDLED :
NETWORK ELEMENTS AFTER THE :
EFFECTIVE DATE OF THE ORDER ON :
REMAND (FCC 04-290 2005) :
(FILED MARCH 7, 2005) :

Public Service Commission Hearing taken
pursuant to notice before Gloria M. D'Amore, Registered
Professional Reporter, in the offices of the Public
Service Commission, 861 Silver Lake Boulevard, Cannon
Building, Suite 100, Dover, Delaware, on Tuesday, March
22, 2005, beginning at approximately 1:29 p.m., there
being present:

APPEARANCES:

On behalf of the Public Service Commission:

ARNETTA MCRAE, CHAIR
JOSHUA M. TWILLEY, VICE-CHAIRMAN
DALLAS WINSLOW, COMMISSIONER
JAY LESTER, COMMISSIONER
JOANN CONAWAY, COMMISSIONER
CORBETT & ASSOCIATES

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APPEARANCES CONTINUED:

On behalf of the Public Service Commission Staff:
GARY A. MYERS, ESQUIRE

On behalf of the Public Service Commission Staff:

BRUCE H. BURCAT, EXECUTIVE DIRECTOR
CONNIE S. MCDOWELL, CHIEF OF TECHNICAL SERVICES
KAREN J. NICKERSON, SECRETARY

On behalf of the Office of the Public Advocate:
JOHN CITROLO

On behalf of Verizon Delaware Inc.:

ANTHONY E. GAY, ESQUIRE
SHARI SMITH

On behalf of A.R.C. Networks, Inc.:

BARRY M. KLAYMAN, ESQUIRE
PAULA BULLOCK

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1 CHAIR MCRAE: All right. Item 7. This
2 is the complaint of A.R.C. Networks against Verizon.
3 Is A.R.C. here?
4 MR. MYERS: There is a representative
5 from A.R.C. Networks. And Mr. Gay is here for Verizon.
6 MR. KLAYMAN: Good afternoon. My name
7 is Barry Klayman. I am with the law firm of Wolf, Block,
8 Schorr and Solis-Cohen. I'm here on behalf of
9 InfoHighway Communications.
10 With me is Paula Bullock, who is the
11 Director of Regulatory Affairs for the company.
12 InfoHighway Communications is a
13 Competitive Local Exchange Carrier. It serves small
14 businesses with telecommunication services in Delaware.
15 In order to provide those services,
16 InfoHighway Communications needs to be able to provide
17 end-to-end service, as you all know. And to do that,
18 InfoHighway needs access to Unbundled Network Elements
19 such as, essentially, local loops, local switching and
20 interoffice transport facilities.
21 We have filed a petition seeking
22 emergency declaratory relief from the Commission. In
23 response to Verizon's stated intent to discontinue
24 accepting and processing orders for Unbundled Network

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1 Elements, under the terms of its Interconnection
2 Agreements with Competitive Local Exchange Carriers, such
3 as InfoHighway Communications, beginning on March 11th.
4 That's why we sought the emergency relief.
5 Essentially, we asked for two forms of
6 relief from the Commission. One is a declaration or an
7 order that requires Verizon to continue to accept these
8 -- to accept and process orders for the Unbundled Network
9 Elements pursuant to their Interconnection Agreements
10 with various Competitive Local Exchange Carriers,
11 including InfoHighway Communications. And to require
12 Verizon to comply with a change of law provision that is
13 contained in the Interconnection Agreements, when they go
14 about implementing the FCC's Triennial Review Remand
15 Order.

16 As I understand it, Verizon, pursuant to
17 their interpretation of the FCC's Triennial Remand Order,
18 they have advised Competitive Local Exchange Carriers
19 that they will reject these orders after March 11th, and
20 they seek unilaterally to impose an interim agreement on
21 these carriers of charges that they have set by
22 themselves without any negotiations with the local
23 carriers and without any process being afforded to the
24 Competitive Local Exchange Carriers.

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1 We argue in the petition that we have
2 filed that there are three reasons why Verizon cannot do
3 what it has been asked -- it intends to do.
4 First, we have argued that the other
5 provisions of the Telecommunications Act requires Verizon

6 to continue to provide these Unbundled Network Element
7 services to Competitive Local Exchange Carriers. And we
8 cite, specifically, to Section 271 of the
9 Telecommunications Act, which imposes the former bell
10 operating companies, we believe, an obligation to
11 continue to provide the Unbundled Network Elements until
12 such time that certain conditions are met, which have not
13 yet been met.

14 Second we argue that pursuant to the
15 terms of the Verizon GTE Merger Agreement, there is an
16 independent obligation that Verizon assumed to provide
17 these Unbundled Network Elements to Competitive Local
18 Exchange Carriers pursuant to the terms of that
19 agreement. And that the FCC Triennial Remand Order does
20 not impact, in anyway, on that obligation and that still
21 remains.

22 But, finally, we come to, I think what
23 is probably the strongest argument, which is the
24 Interconnection Agreement that Verizon has with my

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1 client. That has in it a rather standard change in
2 applicable law provisions and provides, basically, that
3 if there's going to be any material -- any material
4 change to a provision of the agreement -- that the
5 parties have to re-negotiate in good faith to amend the
6 agreement in writing. And if they are unable to do that,
7 the agreements provide that the parties may pursue
8 remedies available to them, including but not limited to,
9 instituting appropriate proceedings before this
10 Commission, the FCC, or a court of competent
11 jurisdiction.

12 Essentially, what it requires is that
13 Verizon has to negotiate in good faith with InfoHighway
14 about the provision of services going forward, as opposed
15 to just announcing that they are going to terminate the
16 provisions and unilaterally setting up an interim rate
17 structure. And failing if those negotiations are not
18 able to be concluded, there are remedies available to
19 both parties, if they are unable to reach agreement and
20 to reduce that agreement to writing.

21 We see nothing in the FCC's Triennial
22 Review Remand Order that authorizes Verizon to merely
23 disregard the Interconnection Agreement that they have
24 with InfoHighway.

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1 We believe that they need to comply with
2 the Interconnection Agreement. And as a result, they are
3 required to negotiate with us. And absent an agreement,
4 then, perhaps, come back to the Commission, again, to
5 have the matter resolved.

6 Thank you.

7 CHAIR MCRAE: Mr. Gay.

8 MR. GAY: Good afternoon. Madam Chair
9 and Commissioners.

10 Once again, Anthony Gay for Verizon.
11 Quite simply, what Mr. Klayman stated is not the case.

12 The issue before you is quite simple and
13 quite straightforward, and, I believe, in a nutshell,
14 Verizon is implementing terms of the FCC Triennial Review
15 Remand Order.

16 Now, by way of background, the TRRO is
17 the FCC's order that is a response to a D.C. Circuit
18 Court of Appeals decision that, in essence, found that

19 the FCC had never had valid and lawful unbundling rules.
20 And what I mean by that is, rules requiring certain
21 elements of Verizon's network to be leased to Competitive
22 Local Exchange Carriers like A.R.C..

23 That decision was attempted by carriers
24 like A.R.C. to be appealed to the Supreme Court. The

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1 Supreme Court denied review of the D.C.'s Circuit
2 decision, and, therefore, it's the law of the land.

3 On February 4th, the FCC issued rules
4 complying with the law of the land. And this is what
5 they said in that February 4th decision.

6 As of March 11, 2005, CLECs are not
7 permitted to add new UNE P arrangement using unbundled
8 access to local service switching.

9 Now, what are a UNE P arrangement is a
10 fancy word for, basically, allowing someone to use part
11 of Verizon's network to provide service. That is one way
12 you can do things. The FCC determined that there are
13 other ways you can provide phone service. And, in
14 essence, they felt that UNE P was such an addictive
15 mechanism for CLECs to, instead of investing facilities
16 to provide true competition, like Comcast provides
17 competition now with Voice Over IP. Or like, Cavalier
18 provides competition with UNE L loops. I'm kind of
19 surprised that they're not a UNE P provider in Delaware.

20 The FCC said, Look, we find that there
21 should be a nationwide bar on UNE P. That's what they
22 said in February 4th order to comply with the D.C.
23 Circuit's what's called institute remand.

24 That is what is at issue here. We are

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1 implementing what the FCC said Verizon should do. It
2 said, as of March 11th, no new UNE P arrangements. For
3 existing customers, they need to be off the network --
4 Verizon's network by March 11, 2006, within 12 months.

5 What A.R.C. is asking you to do today,
6 what they're trying to persuade you to do today is stay
7 an FCC order.

8 First of all, I would submit the
9 Commission should not and cannot do that. This is
10 binding law. As I said, it has been up to the steps of
11 the Supreme Court. The Supreme Court declined to
12 overturn what was the D.C. Circuit's decision, which is
13 the FCC is trying to implement now.

14 I would also say that the majority of
15 commissions that have seen similar petitions by A.R.C.
16 and other CLECs have denied it. It includes the New York
17 commission, the New Jersey commission, the Maryland
18 commission. Several other commissions.

19 And I just want to get into what are
20 really the key points here.

21 First of all, as I said before, this is
22 binding law.

23 Second of all, A.R.C. is trying to
24 persuade you to stay binding law by saying we are

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1 violating our Interconnection Agreements.

2 I will quote for you in a moment
3 applicable language in our Interconnection Agreement,
4 which says, in essence, notwithstanding anything else in
5 these agreements, if we provide 30 days notice in the
6 judicial or regulatory order that says we can stop

7 providing a frequent service. It also says, in some
8 instances, specifically, UNE P services.

9 CHAIR MCRAE: Are you speaking of
10 Section 4.6 and 4.7, those two provisions?

11 MR. GAY: I am glad you raised that,
12 Madam Chair.

13 A.R.C. raised what we believe is a red
14 herring. We believe the agreement they are operating
15 under is the Conectiv agreement. They have raised
16 another breach in the Z-TEL agreement.

17 To answer your question, I think you're
18 referring to the Z-TEL agreement?

19 CHAIR MCRAE: Well, I guess my question
20 ultimately was going to be what agreement. I'm not
21 exactly clear. Are you talking about something other
22 than Z-TEL, when you are referring to the contract
23 language?

24 MR. GAY: Madam Chair, I would say it's

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1 irrelevant, because both agreements have language which
2 allow us to terminate services. In this instance, the
3 FCC said we do not have to provide upon 30 days written
4 notice. But let's go with the Z-TEL agreements --

5 CHAIR MCRAE: Well, both agreements have
6 the same two provisions that you're referring to?

7 MR. GAY: And I would like to read one
8 that particularly deals with what is at issue here today.
9 I'm referring to Section 4.7 of the

10 Z-TEL agreement. I think A.R.C. referred to Section 4.6.

11 MR. MYERS: I got copies.

12 CHAIR MCRAE: I think it would be
13 helpful. What other agreement are we talking about, for
14 my own benefit?

15 MR. GAY: Well, Madam Chair. There is
16 the Conectiv agreement, also. Again, I believe this is a
17 red herring. I think very quickly --

18 CHAIR MCRAE: Well, so we are all on the
19 same page, it would be helpful if we could agree as to
20 which document, even though the language may be the same,
21 and maybe I could look to InfoHighway. Because I do
22 recall there was a bit of back and forth between the two
23 companies about who said what, when it was received and
24 acted upon and the like. And so, that seems to be still

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1 somewhat unclear.

2 So, which agreement are you referring
3 to?

4 MR. KLAYMAN: We believe that the
5 applicable agreement is the Z-TEL agreement. And that
6 there was an adoption by InfoHighway of that agreement.
7 There was an exchange of paperwork with Verizon.

8 And it is my understanding, I think that
9 Verizon failed to file anything with the commission. But
10 I don't think that that effects the contract, the terms
11 of the contract that control as between InfoHighway and
12 Verizon.

13 CHAIR MCRAE: Well, I interrupted
14 Mr. Gay. I'm sure he has a different characterization of
15 what took place with that, from what I read in the
16 documents. So, I mean, if you will continue. At least I
17 know we're talking for purposes of the discussion of
18 Z-TEL.

19 MR. GAY: Madam Chair, I do discourage

20 that recollection of the facts here.

21 Z-TEL did not elect to sign the adoption
22 agreement, or, excuse me, A.R.C. did not elect to sign
23 the adoption agreement for the Z-TEL agreement until
24 after the agreement expired. In our papers we said, we

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1 sent them an adoption agreement. In that adoption
2 agreement, it said that this agreement expires on June 1,
3 2003. They sent in their adoption in July of 2004. So,
4 more than a year later.

5 But if they want the Z-TEL agreement --
6 for purposes of this discussion, I don't want to get
7 waylaid. The language is the same. As a matter of fact,
8 the language in the Z-TEL agreement specifically says,
9 without limiting Verizon's rights pursuant to Applicable
10 Law or any other section of this Agreement to terminate
11 its provision of a UNE or a Combination, if the
12 commission or FCC or court or other governmental body of
13 appropriate jurisdiction determines or has determined
14 that Verizon is not required by Applicable Law to provide
15 such UNE's or Combination, Verizon may terminate its
16 provision of such UNE's or Combination to Z-TEL for new
17 customers. That is Section 1.5 of the Z-TEL agreement.

18 CHAIR MCRAE: There is another provision
19 that says, the parties shall negotiate if something
20 occurs. I'm not sure how they interact with each other.

21 MR. GAY: Well, I would say the language
22 is clear. It says, without limiting Verizon's rights
23 pursuant to Applicable Law, or any other section of this
24 agreement. And then 4.7 says, Notwithstanding anything

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1 in this Agreement to the contrary, if, as a result of any
2 legislative, judicial decision or governmental decision,
3 Verizon is not required by Applicable Law to provide any
4 Service, payment or benefit, otherwise, provided to Z-TEL
5 hereunder, Verizon may discontinue the provision of any
6 such, Service, payment or benefit.

7 So, the language here, and, again, I
8 think we need to start with, what is the law. And I
9 think the FCC was clear, as of March 11, 2005, there will
10 be no new UNE adds and all customers -- existing
11 customers would be off of UNE's by March 11, 2006.
12 That's where you have to start. That's mandatory law.

13 CHAIR MCRAE: If we take that, I would
14 just note, that's, at least the application of it is by
15 no means clear because I'm looking at you named New
16 Jersey, New York. There's Michigan, Illinois. Both
17 sides of the table have kind of looked at what you are
18 setting forth is absolute, almost black letter has,
19 apparently, being addressed at the state level different
20 ways.

21 MR. GAY: I would say, the overwhelming
22 majority of the states, and I can read them for you, have
23 denied these petitions and said they are going to follow
24 governing law.

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1 My knowledge is only four commissions
2 have determined otherwise. That is Georgia, Illinois,
3 Michigan.

4 CHAIR MCRAE: What is the other one?
5 California is on the other side. I think there were four
6 in your filing identified.

7 MR. KLAYMAN: I believe the states that

8 have gone in our favor include, also, Alabama, Illinois,
9 Georgia, Kansas, Kentucky, Michigan, Missouri and Ohio.

10 MR. GAY: No. Kansas has not gone --

11 MR. KLAYMAN: I stand corrected.

12 CHAIR MCRAE: Let's just note, it is not
13 as cut and dry as it appears on the surface that the
14 states have been somewhat divided on these issues.

15 With that said, moving on.

16 MR. GAY: Madam Chair, as I said, I have
17 three points.

18 First of all, the law that has been up
19 to the steps of the Supreme Court is binding law. I
20 would just say, as you know, and as other commissioners
21 know, we are at the end of a long road that began in 2003
22 with the TRO. It went to D.C. Circuit.

23 The FCC, in August of 2004, came back
24 and indicated we will follow the findings of the D.C.

0016 1 Circuit, that, in essence, the D.C. Circuit said after
2 eight years, the FCC had failed to issue any laws of
3 unbundling rules.

4 And in their August 2004 order, they
5 indicated that they were going to follow the FCC rules,
6 or D.C. Circuit's rules as they must.

7 In December of 2004, in its news
8 release, you can't get much clearer than this, December
9 15, 2004, the FCC said, The incumbent LEC's have no
10 obligation to provide competition LEC's unbundled access
11 to mass market local switching. Again, pretty clear.

12 Then, on February 4, 2005, this past
13 February they said that, as of March 11th, there should
14 be no new UNE adds.

15 So, this is, governing law. I believe
16 that the commission's own statute, Title 26 of the
17 Delaware code, gives the Commission, basically, some
18 clear instructions. I will just read Section 7034. The
19 Commission is authorized in power to take -- and in power
20 to take such action and enter such order that is
21 permitted or required by State commissions under the
22 Telecommunication Act of 1996.

23 The FCC is the body that is charged with
24 interpreting that Act. With the guidance of the court,

0017 1 the D.C. Circuit has provided guidance.

2 So, this is binding law. We cited case
3 law, Supreme Court case law that says, Contractual
4 arrangements remain subject to subsequent legislation.
5 That's Supreme Court case law. It's a pretty simple
6 point. You can't contract around the law. You can't
7 contract and do something that's unlawful.

8 I think we have been through the
9 Interconnection Agreement. I don't want to belabor you.
10 And, I think, at the structural level, again, you have to
11 look to mandatory law. As I said, we are complying with
12 the Interconnection Agreements. The Interconnection
13 Agreements say, without regard to anything else in these
14 contracts, if we provide 30 days written notice of
15 implementing a valid regulatory or judicial decision, we
16 can, then, terminate provision of that service. These
17 contracts say, without regard to anything else. So, we
18 are filing the Interconnection Agreement, that is
19 applicable, whichever one A.R.C. picks because both ones
20 have the same terms. We are following the terms of that

21 agreement.

22 Now, A.R.C. has come before you to say,
23 there is some emergency here. I don't think that beers
24 with facts.

0018 1 As I mentioned before, this goes back,
2 at least, to when the D.C. Circuit clearly said that the
3 FCC had failed to implement any lawful unbundling rules.
4 To bring it back a little bit closer, in
5 December of 2004, the FCC said that the ILEC's have no
6 obligation to unbundle mass market switching, which is
7 what is at issue here.

8 February 4th, they made clear in their
9 review order, their order to be consistent with federal
10 law, they were given guidance by the D.C. Court of
11 Appeals that as of March 11th, it is the end of UNE P.
12 Make other arrangements.

13 And in making the determination here
14 that CLEC's need to move away from UNE P, they did so on
15 two grounds. Number one, they found that it is a
16 disincentive for investment of true competition. And
17 also, they found that it's time. It's over. The use of
18 UNE P is defunct. It is an unlawful business model.

19 So, there is no emergency here, other
20 than A.R.C.'s creation of an emergency, but in
21 determining that UNE P was over, the FCC found in the
22 TRRO, that there are alternative arrangements to one
23 means of providing telephone service, which is UNE P.
24 The FCC determined that there is Voice Over IP. There is

0019 1 cable. There are other providers that can get service.

2 So, to make it seem that UNE P is the
3 only option is just incorrect. And The FCC has already
4 determined that ILEC's need to get off of that. They are
5 saying, no new customers as of March 11th. And then they
6 are saying, get everyone else off within a year.

7 So, to claim some armor that there are
8 no alternative, the FCC has already decided this. These
9 arguments have raised before the FCC numerous times and
10 have been before you numerous times.

11 I will stop there for any questions you
12 might have.

13 CHAIR MCRAE: That's very good of you.
14 Thank you. I understood you clearly to say, many times,
15 how clearly the FCC said what it said. And yet, we have
16 this extensive record of rehashing what the FCC said and
17 the division around that. This is not to take away from
18 the merits of the argument that you made. It's just, I
19 think, pretty well established that clear is not
20 altogether clear. At least from the record that has been
21 established over several years we have been dealing with
22 these TELCOM issues.

23 But I certainly heard the basis of your
24 points here.

0020 1 Mr. Klayman, you might want to respond
2 before we open it to the Commissioners for questions.

3 MR. KLAYMAN: The only point I would
4 make, the emergency comes from unilateral imposition of
5 an internal agreement by Verizon under these
6 circumstances.

7 Even the Triennial Review Remand Order
8 required the Incumbent Local Exchange Carriers and the

9 Competitive Local Exchange Carriers to negotiate in good
10 faith regarding any rates, terms and conditions that were
11 necessary to implement the rule change. That is what we
12 say that the Interconnection Agreements require, as well.

13 All we are asking is that the status quo
14 be maintained while the parties negotiate in good faith
15 regarding the implementation of these orders.

16 Thank you.

17 CHAIR MCRAE: Commissioners.

18 COMMISSIONER LESTER: Well, as Mr. Gay
19 said, sufficient notification that as of March 11th.

20 Correct?

21 MR. GAY: We provided it February 10th.

22 COMMISSIONER LESTER: Well, even before
23 that, it was provided. You are not excluding the CLEC's
24 from Interconnection Agreements.

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1 Correct?

2 MR. GAY: No. Interconnection

3 Agreements --

4 COMMISSIONER LESTER: But they will be
5 at the new terms?

6 MR. GAY: I think there are two things
7 we need to keep in mind.

8 As of March 11th, there should be no new
9 UNE P arrangements. That is in the FCC's order. It
10 would be unlawful for us to come back with a contract
11 saying, unless we can privately negotiate something, but
12 not for UNE P. We might be able to negotiate alternative
13 UNE P type arrangements. And what they are trying to do
14 is ask you to override federal law by saying, Hey, we
15 will keep providing to our A.R.C. UNE P after March 11th.

16 So, there has been plenty of notice. I
17 would say, notice went back to March of last year when
18 the D.C. Circuit said the FCC's unbundling rules were
19 unlawful.

20 CHAIR MCRAE: Other questions. I would
21 continue to say, we're dealing with an interpretation of
22 federal law. But some of the concerns that I have around
23 here that makes me question the urgency of this order is
24 the fact that this is not, frankly, a new matter. I do

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1 believe that notice was given that what was going to
2 occur, with respect to the UNE P, the UNE Platform
3 agreement. And an alternative was offered. I forgot the
4 language that you used for this other arrangement that is
5 a substitute.

6 MR. GAY: There are two alternatives.
7 There's the wholesale advantage program and interim UNE
8 service plan for CLEC's, also. There is an interim one
9 and then there is a more long term one, wholesale
10 advantage.

11 CHAIR MCRAE: I do know that there
12 exist, at least, two alternative plans that were
13 identified. And I do agree that it is unequivocal that
14 as of March 11, 2006, it is fully expected that everybody
15 is going to be off of these UNE P arrangements. So, it
16 becomes arguable what is the benefit of going into this
17 process now, particularly when there are alternative
18 arrangements present, as to why we should grant the
19 emergency petition in this matter.

20 And I, frankly, have not found
21 compelling basis for that. I'm just one Commissioner

22 here. I just have not identified anything that supports
23 the position that you're foreclosed from alternative
24 arrangements.

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1 And my understanding is that the
2 ultimate goal is to redirect parties to alternative
3 arrangements as technology is moving, and there is
4 alternative offering.

5 So, while I can't say I fully agree with
6 Mr. Gay on the clarity of all of when this occurs, I have
7 not seen a case to support why we should not proceed to
8 move away from UNE at this juncture. And, actually,
9 looking at the language of the agreement, although it
10 does raise some issue in terms of two provisions
11 together, I do believe it is also a good argument to be
12 made that there is a notice provision that says with a
13 change that they are permitted to do those things.

14 So, I really have not seen anything or
15 heard anything that really runs counter to that at this
16 point.

17 MR. KLAYMAN: Madam Chair, we did submit
18 with our papers an affidavit from a representative of
19 InfoHighway that was directed at the issue of harm to
20 InfoHighway from the imposition of these changes. And we
21 would rest on the papers that we submitted in that
22 regard.

23 CHAIR MCRAE: Yes. I did see that. It
24 seemed to me, how many lines are we talking about here?

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1 MR. KLAYMAN: We have 670 lines
2 currently.

3 CHAIR MCRAE: Currently. So this
4 effects new. So, we're not talking about all of those
5 lines. Some of that is already in place?

6 MR. KLAYMAN: Correct.

7 CHAIR MCRAE: What are we talking about
8 in terms of new?

9 MR. KLAYMAN: I can't tell you in terms
10 of lines. Obviously, what Verizon is proposing is 40
11 percent increase in the rate, which we think will
12 dramatically impact our ability to add any lines in
13 Delaware.

14 CHAIR MCRAE: Well, it is a very tough
15 call. From what I see, I honestly cannot defend a
16 continuation. I don't see immediately a basis for this
17 commission to approve this petition for emergency relief.

18 VICE CHAIRMAN TWILLEY: Madam Chair.
19 May I ask some questions.

20 CHAIR MCRAE: By all means.

21 VICE CHAIRMAN TWILLEY: The end result
22 of what Verizon is doing is to increase your cost by 40
23 percent.

24 Is that what you are saying?

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1 MR. KLAYMAN: Correct.

2 VICE CHAIRMAN TWILLEY: So you can still
3 get the Unbundled Network Elements. It is just going to
4 cost you 40 percent more?

5 MR. KLAYMAN: Correct.

6 VICE CHAIRMAN TWILLEY: So you are not
7 out of business?

8 MR. KLAYMAN: We're not out of business
9 in that sense. But that's all the more reason why we

10 believe that Verizon should be required to negotiate
11 those new rates with us to negotiate in good faith,
12 rather than merely announce them and present them as a
13 fait of accompli to the Competitive Local Exchange
14 Carriers.

15 VICE CHAIRMAN TWILLEY: So, you knew a
16 long time ago, that March 11th was a cut off time?

17 MR. KLAYMAN: I think we knew that. I
18 don't know that we knew what the interim agreement would
19 be that was going to be proposed by Verizon.

20 VICE CHAIRMAN TWILLEY: You mean,
21 Verizon had not yet said what their new rates were going
22 to be?

23 MR. KLAYMAN: Correct. It had not
24 undertaken any negotiations with any of the Competitive

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1 Local Exchange Carriers to discuss what those new
2 arrangements might be.

3 VICE CHAIRMAN TWILLEY: Well, how much
4 advance notice did you have of the new rates?

5 MR. KLAYMAN: I'm not sure I know the
6 answer to that. I'm sorry. I don't know the answer to
7 that. Perhaps Mr. Gay does.

8 MR. GAY: Commissioner Twilley, I think
9 they had a lot of advance notice of the wholesale
10 advantage package. Since the original Triennial Review
11 Order came out in 2003, we have been trying to negotiate
12 that with CLECs.

13 Now, several have come to the table more
14 recently when the FCC made its announcements. I won't
15 disagree with the Chair and say that was clear, although
16 I think the terms are quite simple. The wholesale
17 advantage has been out there since the original TRO
18 Order, which came out in 2003. And Verizon followed that
19 pretty quickly.

20 CHAIR MCRAE: There was some
21 communication between the two of you. It didn't come out
22 in that communication. I thought I saw reference -- was
23 it February. I could be wrong.

24 MR. GAY: We sent industry notice

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1 letters back on February 10th.

2 CHAIR MCRAE: That's February 10th is
3 what came to my mind. I think that is responsive to
4 Commissioner Twilley's question. Frankly, as I recall,
5 from the record, at least that's what I read.

6 VICE CHAIRMAN TWILLEY: So, basically,
7 they had, at least, a month's notice?

8 MR. GAY: Yes. To answer your question
9 direct, at least a month's notice. We believe more.

10 VICE CHAIRMAN TWILLEY: Did you do
11 anything during this month?

12 MR. KLAYMAN: I'm not sure I can answer
13 that question. I'm sorry.

14 I'm sorry. I'm not able to answer that
15 question. I don't know the answer to that question
16 factually.

17 VICE CHAIRMAN TWILLEY: Thank you.

18 CHAIR MCRAE: Other questions from
19 Commissioners?

20 COMMISSIONER CONAWAY: No.

21 COMMISSIONER LESTER: Not at this point.

22 CHAIR MCRAE: If there are not any

23 questions, someone suggest an action here.
24 VICE CHAIRMAN TWILLEY: Madam Chair, may
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1 I make an observation. If I'm not correct, please
2 anybody correct me.

3 But it seems to me that for the last
4 couple of years, at least, we have been hearing loud and
5 clear from Verizon, and, I guess, the other baby bells,
6 too, that the rates they had to charge, in order to
7 encourage competition, have been way below cost?

8 CHAIR MCRAE: Yes.

9 VICE CHAIRMAN TWILLEY: And they are
10 losing lots of money that way, and they want to terminate
11 them. There has been no doubt about the loud and clear,
12 shouting and screaming from Verizon that they are,
13 basically, subsidizing competition because the rates are
14 too low. So, that has been known all along. It's no
15 secret.

16 CHAIR MCRAE: It has been said all
17 along. I will, certainly, acknowledge that it has been
18 said all along. I have not seen the books.

19 VICE CHAIRMAN TWILLEY: Of course. And
20 since Verizon was the only carrier that had these
21 elements, there wasn't anybody else who could provide
22 them.

23 Now, I gather, if I'm hearing it
24 correctly, the FCC has said that there are alternative
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1 ways for these companies to get the services they need.
2 And the original decision to require Verizon to provide
3 these things at what Verizon calls below cost is no
4 longer correct. And so, it's terminated on March 11th.
5 That's, basically, where it is, after you cut through all
6 of the complicated crap -- that 25 pages of argument
7 provided.

8 CHAIR MCRAE: I generally would agree
9 with you that that is what it says. It is abundantly
10 clear with respect to March 11, 2006 being the absolute
11 end point. And with the way technology is evolving and
12 various alternatives currently available, yes, it is
13 certainly the position that --

14 VICE CHAIRMAN TWILLEY: But there is a
15 dilemma here.

16 CHAIR MCRAE: There is a cost issue.

17 VICE CHAIRMAN TWILLEY: The dilemma that
18 I see is that we don't believe the FCC. We don't believe
19 that there are alternative ways to get the services at a
20 price that can permit competition in the arena.

21 So, we would like to help, but the FCC,
22 basically, has vetoed that, or the courts, I guess, or
23 both.

24 CHAIR MCRAE: Well, this whole
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1 regulatory aspect, as Mr. Gay has alluded to, with
2 respect to the background of this telecommunications, I
3 don't think there has been ever been any really clear
4 articulation. The FCC has said something. The District
5 Court has responded. We have been back and forth.

6 What has been arguably clear has not
7 been to the extent that states have evolved in very
8 different ways of looking at this from a state interest
9 standpoint. So, states want to ensure that you have as
10 much competition as possible. So, I think the measures

11 by some states have lead to interpreting what the FCC and
12 the court said in one way. And another set of states, I
13 think we just heard a list on both sides. So, when you
14 suggested it is cut and dry, clearly states have viewed
15 this in two different perspective.

16 I have expressed mine that under this
17 current set of facts, I really cannot justify granting
18 the relief that's requested because I do believe that an
19 alternative is available. And it is now an issue of
20 cost, which the parties are going to have to work out,
21 independent of our role in this Commission. That's my
22 personal perspective. But, I think, depending on who you
23 talking to, you might get different view around clarity
24 when it comes to telecommunication. It is somewhat the

0031 1 state of affairs.

2 VICE CHAIRMAN TWILLEY: Madam Chair, but
3 overriding all of this, and not really irrelevant, but
4 overriding it all, is the fact that telecommunication in
5 this country is changing so fast, that these issues that
6 we are hassling with today are rapidly becoming
7 irrelevant themselves. And Verizon is losing its
8 business pretty fast. Not to these kind of competitors,
9 but to Cell phones. Because even in our own area of
10 knowledge, we have friends now who have disconnected from
11 the landlines altogether and used cell phones as a way to
12 communicate. And that's causing Verizon to continue to
13 lose business and it's going to lose business in the
14 future as well. So, it's faced not only with that, but
15 with this other --

16 CHAIR MCRAE: This is the second time
17 here.

18 (Cell phone ringing.)

19 VICE CHAIRMAN TWILLEY: There goes one
20 out the door.

21 CHAIR MCRAE: There is one hiding in the
22 background who was responsible before.

23 VICE CHAIRMAN TWILLEY: I guess what I'm
24 saying here is that, I no longer regard Verizon as the

0032 1 Ma Ma of it all. Verizon is rapidly shrinking.

2 CHAIR MCRAE: I am sure they will be
3 glad to hear you say that.

4 We have a matter before us. I,
5 certainly, recognize the point you are making. In fact,
6 in some arenas, the argument is not that we are just
7 talking voice, we are talking communications and various
8 modes. You got Voice Over IP. Any number of new
9 technologies. Voice is not the dominant discussion
10 point. And all of that is going to play out over time.
11 And I do agree that we are transitioning away from what
12 we traditionally know as phone service. Perhaps, for
13 you, it's one leap for mankind. I'm still kind of
14 marching along. But, yes, change is occurring. And I do
15 believe we all have to recognize that point and part of
16 the basis for my feeling here.

17 COMMISSIONER WINSLOW: I move that the
18 A.R.C. Networks, Incorporated petition for emergency
19 declaratory relief be denied.

20 VICE CHAIRMAN TWILLEY: I second it.

21 CHAIR MCRAE: All in favor.

22 Yea.

23 COMMISSIONER LESTER: Yea.

COMMISSIONER CONAWAY: Yea.

COMMISSIONER WINSLOW: Yea.

VICE CHAIRMAN TWILLEY: Yea.

CHAIR MCRAE: Opposed? Thank you.

MR. CITROLO: Madam Chair, I would like to point out something while Verizon is still here.

Last week I got a call from one of the governor's cabinet members about services from Verizon. And I just want to say that they addressed it and resolved it very quickly. I want to thank them for making me look like I know what I am doing.

(The Public Service Commission Hearing was concluded at, approximately, 2:10 p.m.)

C E R T I F I C A T E

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 27th day of March A.D. 2005.

GLORIA M. D'AMORE
REGISTERED PROFESSIONAL REPORTER
CERTIFICATION NO. 119-PS

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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